Supreme Court, U. S.
FILED
DEC 7 1977
MICHAEL RODAK, JR., CLERK

BRIEF ON BEHALF OF HAMPTON ROADS SANITATION DISTRICT COMMISSION IN OPPOSITION TO WRIT OF CERTIORARI

In The

Supreme Court of the United States

October Term, 1977

No. 77-540

WILLIAM A. MOORE, ET AL.,
Petitioners,

v.

HAMPTON ROADS SANITATION DISTRICT COMMISSION AND CITY OF NEWPORT NEWS,
Respondents.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

F. O. BLECHMAN
HERBERT V. KELLY
E. D. DAVID
Of Counsel

JONES, BLECHMAN, WOLTZ & KELLY, P.C.
2600 Washington Avenue—Suite 700
Newport News, Virginia 23607
Counsel for Respondent

TABLE OF CONTENTS

Page

Jurisdiction 1

Questions Presented 2

Statement of the Case 2

Summary of Argument for Denial of Writ of Certiorari 6

Argument:

The Law was Appropriately Applied by all the Courts in Finding that the Restrictions Placed on the Use of Petitioners' Leaseholds were a Proper Exercise of the Police Power for which the Petitioners cannot demand compensation 7

Conclusion 13

TABLE OF CITATIONS

Cases

Commonwealth v. City of Newport News, 158 Va. 521, 164 S.E. 689 (1932) 7

Darling v. City of Newport News, 123 Va. 14, 96 S.E. 307 Aff'd., 249 U.S. 450 (1918) 7

Du Pont Rayon Company v. Richmond Industries, 85 F.2d 981 (4th Cir. 1936) 8

Goldblatt v. Town of Hempstead, 396 U.S. 590 (1962) 7, 10

Hampton v. Watson, 119 Va. 95, 89 S.E. 81 (1916) 7

Old Dominion Land Company v. Warwick County, 172 Va. 160, 200 S.E. 619 (1939) 8

Sanguinetti v. United States, 264 U.S. 146 (1924) 7, 8, 9

The Weber City Sanitation Commission v. Craft, 196 Va. 1140, 87 S.E. 2d 153 (1950) 7, 10

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HAMPTON ROADS SANITATION DISTRICT COMMISSION'S BRIEF IN OPPOSITION TO THE GRANTING OF WRIT OF CERTIORARI

JURISDICTION

The jurisdictional statement of the petitioner is incomplete and inaccurate.[1] At the conclusion of the Plaintiff's evidence before the jury on June 3, 1974 the District Court granted the Defendant, Hampton Roads Sanitation District Commission's (sometimes hereafter referred to as HRSDC) motion for a directed verdict pursuant to Rule 50(a) of the Federal Rules of Civil Procedure. Following the jury's responses to the special interrogatories, the District Court en-

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[1] The Petitioners' writ says it seeks review of the District Court's opinion. That is obviously incorrect.

tered a judgment *non obstante veredicto* in favor of the Defendant, City of Newport News, on March 10, 1975. From this opinion the petitioners appealed to the Fourth Circuit Court of Appeals. The Fourth Circuit three-judge panel's opinion affirming as to the Defendant, Hampton Roads Sanitation District Commission and reversing the District Court as to the City of Newport News is dated October 7, 1976. The City of Newport News asked the Fourth Circuit for a hearing *en banc,* and the same was granted as to the question involving the City on November 24, 1976. The Fourth Circuit's opinion reversing its panel and affirming the District Court's opinion as to the City is dated July 13, 1977.

QUESTIONS PRESENTED[2]

III

Does The Imposition Of A Valid Restriction On The Use Of Petitioners' Oyster Beds By The Virginia State Department Of Health Require Hampton Roads Sanitation District Commission To Condemn The Petitioners' Leasehold Interest Pursuant To Either The Fifth Amendment Of The United States Constitution of Article I § 11 Of The Virginia Constitution?[3]

STATEMENT OF THE CASE

In September of 1972 this suit was instituted in District Court by ten leasees of oyster beds in the Warwick River against Hampton Roads Sanitation District Commission, (hereinafter "HRSDC") and the City of Newport News.[4] HRSDC is a political subdivision of the Commonwealth of

[2] The first two questions posed by the petitioners do not concern HRSDC as they go to the tort liability of the defendant. The petitioner admits HRSDC is not negligent.

[3] The question posed is inappropriate. The evidence establishes that HRSDC had nothing to do with contamination of the river. The river was not condemned, that is what is sought in this appeal.

Virginia charged with the collection and removal of sewage in the Hampton Roads area of Virginia.

As to the HRSDC, the complaint charged:[5]

1. That the James River sewage Treatment Plant is constructed so that its main discharge pipe empties into the Warwick River, causing the area surrounding said pipe to be condemned for the purpose of harvesting and marketing shellfish; said area being called a "buffer zone;"
2. That the requirement for the "buffer zone" was or should have been known to the Hampton Roads Sanitation District Commission at the time of the design and installation of said James River Sewage Treatment Plant;
3. That the creation of said "buffer zone" destroyed the use of said grounds for the harvesting and marketing of shellfish, making said grounds worthless;
4. That the conversion of said grounds into a state of worthlessness was done without the benefit of due process, and said conversion was for the purpose of enabling Hampton Roads Sanitation District Commission to fulfill its purpose as a public authority;
5. That the drainage from the James River Sewage Treatment Plant contains high amounts of bacteria, viruses, and other pollutants which have destroyed the value of Plaintiff's oyster grounds and the oysters thereon;
6. That the presence of said pollutants are proximately and solely the result of the negligence and willful failure of Hampton Roads Sanitation Commission to properly treat and process the sewage as it flows through its plant.

At trial plaintiffs abandoned all previous allegations of

[4] A number of other Plaintiffs intervened in this District Court suit. These Plaintiffs did not note an appeal to the Fourth Circuit and it is the Respondent's position that they are not now before this Court.

[5] See complaint paragraphs 7, 8, 11, 12, 13, and 14, et als.

negligence in any form against HRSDC. In fact, plaintiffs' expert testified that the treatment and processing of the sewage was proper and in no way contributed to any of the pollutants in the Warwick River. (Trial Transcript 82) At the conclusion of Plaintiffs' evidence the Court sustained HRSDC's motion for a directed verdict and later expanded in its opinion following trial on its reasons for doing so.

> It was apparent at the conclusion of plaintiff's evidence that no evidence had been developed in any way to show that Hampton Roads was guilty of any negligence whatsoever. There was no evidence that the James River Plant of Hampton Roads had overflowed or had functioned improperly or that untreated affluent pollutants had been deposited in the Warwick River through any action of Hampton Roads. The Plaintiffs agreed to this and acknowledged on the record that their only claim against Hampton Roads was under the Fifth and Fourteenth Amendments. They argued that a buffer zone against the harvesting of oysters which had been established around the area of the James River Disposal Plant outfall by the State Department of Health was a taking by Hampton Roads without compensation under the Fifth and Fourteenth Amendments. No evidence was produced that Hampton Roads had anything to do with the creation of that buffer zone. It was established by the State Health Department under health standards and authority extant since the 1930's. Hampton Roads had exercised its power of eminent domain to condemn and pay for that part of the bottom that it was physically using for its outfall line.
>
> The action of the State Board of Health in Shellfish Restrictive Order No. 55, establishing the buffer zone at the outfall of Hampton Roads' James River sewerage disposal plant, was pursuant to Section 28.1-175, Code of Virginia, 1950, Amended.
>
> Similar action closing the identical area of the Warwick River had been directed by the State Board of Health under authority of the same statute on many occasions prior to the opening of the James River plant in 1967. The entire River had been closed in 1942 and again in 1962.
>
> No attack on the constitutionality of Title 28.1 of the Virginia Code affecting shellfish, nor to the health standards thereunder, was raised by the plaintiffs in this suit. There was no evidence that any plaintiff had availed himself of the express provisions of Title 28.1-178, Code of Virginia, 1950, Amended, to have the restriction released.
>
> The provisions of Title 28.1-175 of the Code of Virginia protecting the health of the public are an undoubted proper exercise of the police power of the State. (Appendix pp. 7-10)

On those facts the Fourth Circuit panel had no trouble affirming the District Court.

> The Commission, however, has not been shown to have violated any statutory or regulatory provision. The public right to discharge sewage into the Warwick has been qualified by the legislature only to the extent provided by the pollution control statutes. The Commission, in exercising its statutory right to discharge treated sewage into the Warwick, abridged no rights of the plaintiffs, who took their leases subject to the risk of closure due to lawful discharges. (Appendix p. 41)

The City of Newport News asked for a rehearing *en banc* which was granted to decide the question of admiralty jurisdiction, an issue having no application to the claim against HRSDC.

It is important to understand that the "buffer zone" established by the State Department of Health does not make the harvesting of oysters impossible. The effect of such an order is that oysters would have to be harvested from their home

ground and relayed to an unclosed portion of a river for a period of fifteen days before the oysters could be directly sold to the market. Thus, at best, a limitation on the use of property is at issue in this case, not the taking of property as claimed by the Petitioners.

SUMMARY OF ARGUMENT FOR DENIAL OF WRIT OF CERTIORARI

This Court's Rule 19 requires that the Petitioners set forth "special and important reasons" as to why the Court should grant the writ. HRSDC thinks it apparent on the face of the writ that even the Petitioners do not believe that there are any special or important reasons for the writ to be granted as to HRSDC. The only question which the Petitioners present that in anywise reaches the issues posed in this cause against the HRSDC is the third question (Petition, page 3). Even that question does not fairly represent or state the appropriate issue raised by the case (see page 3, *infra.*). Furthermore, the statement of the facts (Petition, 7-8) is a misstatement and incomplete.

In a petition for certiorari that is 78 pages long, the Petitioners do not get around to the case against HRSDC until page 72, and then only devote four pages to its argument. No authority is cited in support of the proposition that either the District Court or Court of Appeals was wrong.

In addition to Petitioners' own Petition making it apparent that there are no "special and important reasons" for granting this writ, it is also readily apparent that the case is properly decided. There is no argument that HRSDC had anything to do with the creation of the buffer zone.

The Fourth Circuit noted that the public's right to discharge sewage into the Warwick River was qualified only to the extent provided by the pollution control statutes and

that there had been no evidence that any such statute had been violated.

Furthermore, the decision of this Court laid to rest any suggestion that there had been a taking which is compensable under the Fifth and Fourteenth Amendments, *Sanguinetti* v. *United States,* 264 U. S. 146 (1924). The law in Virginia is that the proper exercise of the police power is not a taking for which compensation need be paid. *The Weber City Sanitation Commission* v. *Craft,* 196 Va. 1140, 87 S.E. 2d 153 (1950). The Virginia law is in complete accordance with the Federal law as expressed by this Court in *Goldblatt* v. *Town of Hempstead,* 369 U.S. 590, 8 L.Ed. 2nd 130, 82 S. Ct. 987 (1962).

ARGUMENT

The Law Was Appropriately Applied By All The Courts In Finding That The Restrictions Placed On The Use Of Petitioners' Leaseholds Were A Proper Exercise Of The Police Power For Which The Petitioners Cannot Demand Compensation.

Though the Petitioners would have you believe that the creation of the buffer zone was somehow done pursuant to Federal Drug Administration requirements (Petition, 7), that is simply a misstatement. As the District Court pointed out, the buffer zone was created by the Commonwealth of Virginia's State Department of Health pursuant to statutory authority which had been in existence since the 1930's. Any suggestion to the contrary is inaccurate and inappropriate.

It has been established law in Virginia for over five decades that the public, acting through its legislature, may use its waters as part of its sewage disposal system. *Darling* v. *City of Newport News,* 123 Va. 14, 96 S.E. 307 aff'd., 249 U.S. 540 (1918); *Hampton* v. *Watson,* 119 Va. 95, 89 S.E. 81 (1916); *Commonwealth* v. *City of Newport News,* 158

Va. 521, 164 S.E. 689 (1932); *Old Dominion Land Company* v. *Warwick County,* 172 Va. 160, 200 S.E. 619 (1939) and *Du Pont Rayon Company* v. *Richmond Industries,* 85 F.2d 981 (4th Cir. 1936). For an equally long time it has been unquestioned that a lessee of oyster beds holds his lease subject to the right of a governmental agency to discharge sewage in navigable streams. *Id.*

Petitioners ignore that proposition and argue that since HRSDC knew some oyster grounds would be closed for direct marketing by the State Health Department, it should have taken steps to condemn those lands. This argument lacks force for the additional reason that such a restriction on the direct marketing of oysters does not require condemnation by HRSDC. As this Court said in *Sanguinetti* v. *United States,* 246 U.S. 146 (1924):

> In order to create an enforceable liability against the government, it is, at least, necessary that the overflow be the direct result of the structure; and constitute an actual, permanent invasion of the land, amounting to an appropriation of, and not merely an injury to, the property. *Id.* at 149.

The question of whether there is a taking is answered by the facts. The creation of the buffer zone has nothing to do with the invasion of Petitioners' property by HRSDC. The facts show the buffer zone was established by another State governmental agency in contemplation of what possibly could occur, certainly not what probably would occur. The effluent discharged by HRSDC into the receiving waters has not been shown to have interfered with the use of Petitioners' oyster leases in any way. Thus, within the *Sanguinetti* test there was no actual invasion of the ground. Certainly nothing HRSDC has been shown to do amounts to an appropriation of Petitioners' property. Petitioners are

really arguing that the injury caused by the creation of the buffer zone is so great that it amounts to a taking. While the facts will not support that, even if they did, that is an injury not caused by HRSDC.

The facts show that prior to the establishment of the buffer zone, these oyster bottoms had been subject to the same type of closing orders. Further, the facts are undisputed that it was only a matter of time before these grounds would have been closed from the natural pollution of the river. And most convincingly, the evidence is that Warwick River would most probably have been closed in 1972 even if the James River Sewage Treatment Plant was not there.

Thus, if the number of closings or their duration were increased or prolonged by the construction of the James River Sewage Treatment Plant, such is a matter of pure conjecture. At best, the creation of the buffer zone regulated the use of these oyster beds earlier than they might have otherwise been regulated. As the *Sanguinetti* court put it:

> The most that can be said is that there was probably some increased flooding, due to the canal, and that a greater injury may have resulted than otherwise would have been the case. But this and other matters aside, the injury was, in its nature, indirect and consequential, for which no implied obligation on the part of the government can arise. *Id.*, 150.

The creation of the buffer zone by a governmental agency over which HRSDC has no control was an indirect and consequential injury for which, if there is recourse, the Petitioners must look to the State Department of Health and not HRSDC.

Even if HRSDC is the responsible party, it is likewise clear that no exercise of the power of eminent domain was required by the establishment of the buffer zone. The Court

must remember that the only damages suffered by the Petitioners, if there by any, are marked by the closing of the Warwick River by the State Department of Health. If the closings were proper, it is axiomatic that such was a proper exercise of the police power for which no compensation need be paid. *The Weber City Sanitation Commission* v. *Craft,* 196 Va. 1140 (1955).

Thus, the sole question becomes whether the establishment of the closed areas was an exercise of the police power (for which no compensation need be paid) or was an exercise of the power of eminent domain (for which compensation must be paid). In Virginia, the answer that the creation of the buffer zone is a proper exercise of the police power is easy. The Virginia Supreme Court said in *The Weber City Sanitation Commission,* op. cit., 1150-51:

> Thus, while . . . taking water for domestic or agricultural purposes . . . and the cutting and taking of ice are lawful . . . on such water to which a party lawfully has access, all of these avocations and pursuits may be restricted or prohibited when public health demands a restriction or prohibition. . . . A statute empowering a state board of health to prohibit the use of water or ice from any given source where, in the opinion of the board, the use thereof endangers the public health is valid, and does not offend against the constitutional provision respecting personal liberty.

Likewise, the case of *Goldblatt* v. *Town of Hempstead,* 369 U.S. 590 (1962) puts beyond question any issue as to whether the creation of the buffer zone was an exercise of the police power. In the *Goldblatt* case the City brought an action to enforce its 1958 ordinance prohibiting excavations below two feet above the maximum ground water level. Goldblatt defended on the grounds that he had been engaged in dredging and pit excavating on a 38-acre tract

within the town continuously since 1927 and that such a regulation took his property without due process of law. The Supreme Court unanimously upheld the City's regulation as a valid exercise of the police power. Its words are instructive and dispositive of this case.

> Concededly the ordinance completely prohibits a beneficial use to which the property has previously been devoted. However, such a characterization does not tell us whether or not the ordinance is unconstitutional. It is an oft-repeated truism that every regulation necessarily speaks as a prohibition. If this ordinance is otherwise a valid exercise of the town's police powers, the fact that it deprives the property of its most beneficial use does not render it unconstitutional. . . . As pointed out in *Mugler* v. *Kansas,* (123 U.S. 623, 668, 669):
>
> (T)he present case must be governed by principles that do not involve the power of eminent domain, in the exercise of which property may not be taken for public use without compensation. A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit. Such legislation does not disturb the owner in the control or use of his property for lawful purposes, nor restrict his right to dispose of it, but is only a declaration by the State that its use by any one, for certain forbidden purposes is prejudicial to the public interests. . . . The power which the States have of prohibiting such use by individuals of their property as will be prejudicial to the health, morals, or the safety of the public, is not—and, consistently with the existence and safety of organized society, cannot be—burdened with the condition that the State must compensate such individual owners for pecuniary losses they may sustain, by reason of their not being permitted,

> by a noxious use of their property, to inflict injury upon the community.
>
> Nor is it of controlling significance that the "use" prohibited here is of the soil itself as opposed to a "use" upon the soil, or that the use prohibited is arguably not a common-law nuisance. . . .

This is precisely the situation with which the oystermen have been faced. The creation of the buffer zone by the State Health Department means nothing more than that the oysters on Petitioners' oyster beds are not available for direct marketing (Trial Transcript, 149), but rather have to be replanted for 15 days before they can be marketed (Trial Transcript, 150-151).

The Petitioners concede that this argument is "undisputed" (Petition, 74). Petitioners try to escape this dilemma by citing *Nichols* out of context (Petition, 74-75) and engaging in a bit of sophistry. They argue since HRSDC caused the State to exercise its police power, HRSDC is now liable for failing to exercise its power of eminent domain. This they say is true because, but for the existence of the outfall line, the Warwick River was "made subject to laws which it was subject before. . . ." The argument is nonsense. Factually, the Petitioners have always been subject to this police power regulation; hence the principle, even if appropriate, has no application here. Legally, it is without merit to argue that what the State Health Department or HRSDC could do alone, they cannot do together.

CONCLUSION

For the reasons stated herein the writ of certiorari should not be granted.

Respectfully submitted,

JONES, BLECHMAN, WOLTZ & KELLY, P.C.
F. O. BLECHMAN
HERBERT V. KELLY
E. D. DAVID
2600 Washington Avenue—Suite 700
Newport News, Virginia 23607
Counsel for Respondent